Supreme Court, U.S.
FILED
SEP 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-404

In The

Supreme Court of the United States

October Term, 1990

ILLINOIS STATE LABOR RELATIONS BOARD, ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES, AND ILLINOIS DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

ILLINOIS NURSES ASSOCIATION,

Respondent.

BRIEF OF AMICUS CURIAE AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, COUNCIL 31, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners' question is not presented under the terms and circumstances of the case. The question actually presented is the following:

> Does federal labor law preempt the power of a State to prohibit the contracting out of health services to inmates incarcerated in a state correctional facility and to render ultra vires and null and void any such contract?

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Amicus curiae opposes the petition for writ of certiorari.[1]

[1] Amicus curiae, pursuant to leave of the Illinois Supreme Court, participated as amicus curiae in the proceedings before that court.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is essentially correct. The following facts are herein pertinent.

A collective bargaining agreement between Illinois Nurses Association ("INA") and the ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES ("CMS") recognizes INA as the exclusive bargaining representative of professional registered nurses employed by the State of Illinois. (P. 4)

The ILLINOIS DEPARTMENT OF CORRECTIONS ("DOC") contracted with CORRECTIONAL MANAGEMENT SYSTEMS ("Systems") for the furnishing of health care services to the inmates in various state correctional facilities. (P. 5)

INA filed an unfair labor practice charge with the ILLINOIS STATE LABOR RELATIONS BOARD ("ISLRB") alleging that CMS and DOC had violated the Illinois Public Labor Relations Act ("IPLRA") by refusing to bargain with INA and by refusing to comply with the collective bargaining agreement applicable to professional nurses employed by the State of Illinois. (P. 5)

The ISLRB dismissed the charge, finding, on the basis of an evidentiary record and the application of NLRB law, that Systems, a private company subject to NLRB jurisdiction, was the employer of the nurses. (Pp. 6-7) In its opinion, the ISLRB described the impact of the relief sought by INA, e.g., application of the collective bargaining agreement to the nurses in question:

> ". . . . Should the state comply, the subcontractor relationship would cease to exist; indeed it is

> ludicrous to imagine that the contract could continue in effect with all State wages, benefits and other conditions of employment simply superimposed on it. The employees would in effect *become* those of the State." (App. 23)

On review, the Illinois Appellate Court reversed. Its decision was predicated on Illinois law which prohibited the contracting out of the State's nondelegable obligation to provide medical care to prisoners in state correctional facilities. (App. 10) Therefore, the Court ruled that, by operation of state law, DOC was the employer within the meaning of the IPLRA. (App. 11) The Court remanded to the ISLRB for a determination of the refusal to bargain charge against the State of Illinois. (App. 12)

The Illinois Supreme Court denied the petition to review that decision and later denied the petition to reconsider. (Apps. 1 and 2)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE STATE COURT OF LAST RESORT HAS NOT DECIDED A FEDERAL QUESTION.

The remand order of the Illinois Appellate Court directed the ISLRB to litigate the refusal to bargain charge against the petitioners herein. Under Illinois law, a remand order is not a final or appealable order. See *Wilkey v. Illinois Racing Board*, 96 Ill.2d 245, 449 N.E.2d 843 (1983). Hence, the declination of the Illinois Supreme Court to accept this case for review, in the application of State law, was predicated upon lack of an appealable

order and not on the merits of the appellate court decision.

II. NO FEDERAL QUESTION IS PRESENTED.

As first above stated, Petitioners fail to even address the "question" which arises under the facts of this case. Instead, they argue issues not relevant to the case.

Applying Illinois law, the Illinois Appellate Court has invalidated the subcontract between DOC and Systems and directed the Petitioner ISLRB to recognize DOC as the employer of the nurses. It is that Court determination that is challenged in the petition. Yet, the petitioners never address the authority of the Illinois courts to make such a determination in the application of state law. Instead, the petitioners simply *assume* without either explanation or supporting rationale that Systems is the employer and proceed to base their entire argument upon the application of rather clear principles of federal law that would apply *if, but only if,* Systems *were* the employer.

Unless some principle of federal law preempts the right of a state to illegalize subcontracting of nondelegable state functions, there is no federal issue before this Court. No such federal principle is asserted.

No contention is made that the DOC is not an exempt state subdivision within the meaning of Section 2(2) of the LMRA. See *NLRB v. Natural Gas Utility District*, 402 U.S. 600 (1971). Hence, there can be no claim that the appellate court order, which deals only with the DOC as an employer, creates a conflict with the NLRB.

III. NO FEDERAL LAW CONFLICT IS CREATED WITH THE DECISION OF ANY OTHER COURT.

Petitioners do not suggest that any court has ever ruled that a state is preempted from illegalizing the subcontracting of nondelegable state responsibilities. Hence, Petitioners do not challenge the authority of the state to require that state agencies retain their responsibilities as the employer.

Petitioners argue only that a *Garmon* preemption issue is raised.[2] But since DOC and CMS are excluded employers under § 2(2) of the LMRA, there is no preemption issue.

IV. NO "IMPORTANT" FEDERAL ISSUE IS RAISED.

We can conceive of no argument that could be made that federal law preempts the sovereign power of a state to decide whether its nondelegable powers could be contracted out to private parties. Indeed, decisions of this Court dealing with questions of federalism render even the possibility of any such future decision most unlikely. See *Garcia v. San Antonio Metro. Transport Authority*, 469 U.S. 528 (1985); *Pennsylvania v. Union Gas Co.*, ___ U.S.

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[2] We believe that the petitioners erroneously characterize their pre-emption contention as a *Garmon* issue. *Garmon* dealt with conduct arguably subject to § 7 or § 8 of the LMRA and therefore within the exclusive jurisdiction of the NLRB. The instant pre-emption claim, properly characterized, relates to representation issues involving a given employer and employee unit with respect to which § 9 confers jurisdiction upon the NLRB. Not pre-empted is a case involving an employer excluded under § 2(2).

___, 57 USLW 4662 at 4663; *Texas, Inc. v. Short*, 454 U.S. 516 (1982); *Bishop v. Wood*, 426 U.S. 341, 345-346 (1976).

In the instant case, absent review by this Court, the ISLRB will implement the remand and require DOC and CMS to bargain with the INA and honor the provisions of the statewide contract covering registered nurses. The question of a federal issue will then end.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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